IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

HAROLD TAYLOR PLAINTIFF

vs. Civil Action No. 4:96cv270-D-B

STEVE PUCKETT, et al. DEFENDANTS

MEMORANDUM OPINION

Upon consideration of the file and record in this action, the court is of the opinion that the Magistrate Judge's Report and Recommendation should be approved and adopted. Having conducted an independent, de novo review of the record, the prepared transcript of the non-jury trial conducted by the Magistrate Judge on October 3, 1996, petitioner's objections, and applicable case law, the court is of the opinion that the Magistrate Judge correctly assessed both the facts and the law in reaching his conclusion.

I. Findings of Fact

Mississippi Department of Corrections ("MDOC") officials incarcerated the plaintiff at the state prison facility at Parchman, Mississippi, in August of 1991. MDOC officials placed the plaintiff in Unit 32-B of the penitentiary for evaluation of his HIV status. Mr. Taylor requested to be placed in protective custody in November of 1991, and he entered protective custody in December of 1991. In March of 1995, an MDOC classification committee conducted a hearing regarding the plaintiff's housing status and directed that he be placed in HIV-housing at Unit 28, despite the plaintiff's request to remain in protective custody.

On the date of his transfer from Unit 32-B to Unit 28-C, the plaintiff refused to leave his cell in Unit 32 and again informed MDOC officials of the danger to his safety if housed in Unit

28. Capt. Rayford Jones, who supervised the plaintiff's transfer, telephoned a person in classification to ensure that his transfer orders were appropriate. Classification assured Capt. Jones that the plaintiff had to be moved. Mr. Taylor still refused to leave his cell, whereupon Capt. Jones again called classification. Again, classification instructed Capt. Jones to transfer the plaintiff.

Capt. Jones summoned a "take down" team to Mr. Taylor's cell. When the plaintiff refused to be handcuffed, defendant Andrew Johnson sprayed mace into the plaintiff's cell. The plaintiff was taken to the MDOC infirmary where Dr. Santos treated him. While the plaintiff's eyes became irritated, he suffered no injury which required medical treatment. After Dr. Santos examined the plaintiff, MDOC officials transferred the plaintiff to Unit 28. After his transfer, the plaintiff requested protective custody from the Unit 28 watch commander, Lt. Thomas Flowers. Lt. Flowers issued a detention notice and transferred the plaintiff back to Unit 32-B, where the plaintiff remains housed.

This cause essentially consists of two constitutional claims. First, the plaintiff claims that MDOC officials used excessive force in transferring him to Unit 28. Second, the plaintiff asserts that the defendants displayed deliberate indifference to his safety by ordering his transfer from Unit 32 to Unit 28. It was the recommendation of the Magistrate Judge that both of these claims be dismissed.

II. Excessive Force

As to the first of the plaintiff's claims, the Magistrate Judge was of the opinion that the plaintiff demonstrated neither excessive force nor an injury. As both elements are essential to such a claim, the Magistrate Judge opined that the claim must be dismissed. The plaintiff, in his

objections to the Report and Recommendation, takes issue with the Magistrate Judge's determinations regarding the sufficiency of "injury" required to state a claim for excessive force. Regardless of whether the Magistrate Judge was correct in that determination, the undersigned agrees that the plaintiff has failed to demonstrate that the force used to oust him from his cell was excessive under the circumstances. This fact alone necessitates the dismissal of his excessive force claim. Capt. Jones and the officers under his direction were under orders to transfer the plaintiff and after twice confirming their validity, they had no discretion to ignore those orders. When faced with an inmate who absolutely refused to leave his cell, these defendants had little option other than to enter the cell and risk the use of much greater force to retrieve the plaintiff. Instead, the utilization of chemical spray resolved the situation with nothing more than irritation to the plaintiff' eyes. In the opinion of this court, the use of force employed by MDOC officials in this case was most certainly not excessive.

The plaintiff's only offered objection relative to this aspect of his claim, aside from repeated conclusory remarks that the defendants did use "excessive force," is the argument that the MDOC officials violated penitentiary policy in using chemical spray in this case. That MDOC officials violated prison policy does not mean that they have violated the plaintiff's constitutional rights. See, e.g., Myers v. Klevenhagen, 97 F.3d 91, 94 (5th Cir. 1996) (violation of prison policy does not require finding of due process violation). In order to be liable for the use of excessive force in violation of an inmate's Eighth Amendment rights, it is necessary for Mr. Taylor to prove that the officials used force not "applied in a good-faith effort to maintain or restore discipline, [but] maliciously and sadistically to cause harm, and that he suffered an injury." Eason v. Holt, 73 F.3d 600, 601 (5th Cir. 1996) (citing Hudson v. McMillian, 503 U.S.

1, 7, 112 S.Ct. 995, 999, 117 L.Ed.2d 156 (1992)). In the opinion of this court, Mr. Taylor has failed to do so in this case. Judgment shall be entered for the defendants on this claim of the plaintiff.

III. "Deliberate Indifference" to the plaintiff's safety and well being

In order to prevail on this claim, Mr. Taylor must demonstrate that the MDOC officials who ordered his transfer had subjective knowledge of a substantial risk of serious harm to him and responded with deliberate indifference to that risk. Farmer v. Brennan, --- U.S. ---, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); Hare v. City of Corinth, 71 F.3d 633, 650 (5th Cir. 1996). While there is certainly evidence before the court that Mr. Taylor informed the committee of danger to his safety, this court is unconvinced that the committee members possessed "subjective knowledge" of a "substantial risk" of harm in this case. Again, the mere fact that MDOC officials may have violated prison policy in refusing to grant protective custody to the plaintiff does not give rise to a constitutional violation. Judgment shall be entered for the defendants on this claim of the plaintiff as well.

IV. Assessment of Costs

While the Magistrate Judge recommended that the plaintiff take nothing on his claims in this case, he noted that:

> The failure of the classification committee to adhere to MDOC policy resulted in the ugly incident between the plaintiff and security officers at Unit 32 and prompted the filing of plaintiff's lawsuit. The end result has been the needless expenditure of taxpayer money to transport the plaintiff and others from Parchman to Greenville on two occasions for the Spears hearing and the non-jury trial of this case. It is, therefore, the recommendation of the undersigned that all court costs in this case be assessed against defendant Christopher Epps, Classification Director, who approved the classification committee's recommendation.

Taylor v. Puckett, et al., Civil Action No. 4:95cv270-D-B (N.D. Miss. Oct. 3, 1996) (Bogen, M.J.) (Magistrate Judge's Report and Recommendation). The defendants have filed no objections to the Magistrate Judge's Report and Recommendation. While costs are normally awarded to the prevailing party, the assessment of costs upon the entry of judgment is ultimately a matter within this court's sound discretion. Fed. R. Civ. P. 54(b). Costs may even be awarded against a prevailing party in some instances. Sheets v. Yamaha Motors Corp., 891 F.2d 533, 539 (5th Cir. 1990); United States v. D.K.G. Appaloosas, Inc., 829 F.2d 532, 539 (5th Cir. 1987); Schwarz v. Folloder, 767 F.2d 125, 131 (5th Cir. 1985). Generally, however, such an award *against* a prevailing party is based upon some improper conduct on the part of that party:

> As we understand it, the denial of costs to the prevailing party or the assessment of partial costs against him is in the nature of a penalty for some defection on his part in the course of litigation as, for example, by calling unnecessary witnesses, bringing in unnecessary issues or otherwise encumbering the record, or by delaying in raising objection fatal to the plaintiff's case. (citations omitted). A party, although prevailing, would be denied costs for needlessly bringing or prolonging litigation.
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> [W]e are of the opinion that, in the absence of some showing of bad faith or the deliberate adoption of a course of . . . dealings calculated to render litigation pertaining thereto unnecessarily prolix and expensive, the penalty of denial or apportionment of costs under Rule 54(d) should be imposed only for acts or omissions on the part of the prevailing party in the actual course of the litigation . . . .

Popeil Bros., Inc. v. Schick Elec., Inc., 516 F.2d 772, 775 (7th Cir. 1975); see also Walker v. Omaha Mut. Indem. Co., 835 F.2d 857, 859 n. 4 (11th Cir. 1988) (assessment of costs against prevailing defendant because appeal unnecessary; defendant's failed to advise district judge of controlling law of which it had knowledge).

This court agrees with the Magistrate Judge that the defendants most certainly brought this suit upon themselves by failing to follow established MDOC procedures. Nevertheless, that

fact did not impose liability upon them in this case, and the court finds no evidence of bad faith or other improper action on the part of the defendants in this cause which warrant the sanction of costs under the standard as enunciated in Popeil Bros. In light of the existing standard required to levy costs against a prevailing party under federal law, this court does not agree with the Magistrate Judge that all costs should be borne by the defendant Christopher Epps and this portion of the Report and Recommendation shall not be adopted by this court.

V. Conclusion

After careful consideration, the undersigned is of the opinion that the Report and Recommendation of the Magistrate Judge should be adopted and approved as modified by this opinion. The plaintiff's objections shall be overruled, and judgment shall be entered on behalf of the defendants in this case.

A separate order in accordance with this opinion shall issue this day.

This the _____ day of April 2001.

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United States District Judge

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ORDER ADOPTING REPORT AND RECOMMENDATION
AND DISMISSING CAUSE

Pursuant to a memorandum opinion issued this day, it is hereby ORDERED THAT:

1) the Report and Recommendations of United States Magistrate Judge Eugene M. Bogen dated October 3, 1996, are hereby ADOPTED AND APPROVED as the opinion of this court as modified by this court's memorandum opinion issued this day;

2) the plaintiff's objections to the Report and Recommendations of the Magistrate Judge are hereby OVERRULED;

3) judgment is hereby entered on behalf of the defendants in this matter. The plaintiff's claims are hereby DISMISSED and this case is CLOSED.

SO ORDERED, this the _____ day of April 2001.

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United States District Judge